Supreme Court, U.S.
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No. 92-0092

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

BRODERICK INVESTMENT COMPANY,
a partnership and successor to
Broderick Wood Products, Inc., *et al.*,
Petitioners,

v.

THE HARTFORD ACCIDENT & INDEMNITY COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. On the facts of this diversity case, did the court of appeals correctly apply state contract law in holding that the "pollution exclusion" in the insurance policies at issue excludes coverage for property damage arising out of Broderick's industrial practice of continuous and deliberate discharges of toxic wastes into and onto its land for 35 years?

2. Did the court of appeals act within its power in reversing the judgment for petitioners and holding as a matter of law on the facts of this case that the pollution exclusion bars coverage of most of Broderick's toxic waste discharges?

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RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion and order on rehearing of the United States Court of Appeals for the Tenth Circuit is reported at 954 F.2d 601 (10th Cir. 1992) and is reprinted in the Appendix to the petition for a writ of certiorari at 1a-17a. The court's judgment entered January 8, 1992, is reprinted in the Appendix at 18a-19a. The Court of Appeals' Certification Of Question of State Law, filed on August 13, 1991, is included in the Appendix at 20a-27a. The order

of the Colorado Supreme Court declining certification of the question is reprinted in the Appendix at 28a-30a.

The bench ruling of the United States District Court for the District of Colorado (Weinshienk, J.) is not reported. A transcript of the proceeding is reprinted in the Appendix at 31a-36a.

JURISDICTION

This action was brought in the United States District Court for the District of Colorado under 28 U.S.C. § 1332(a)(1). On March 16, 1990, the district court entered judgment for petitioners under Federal Rule of Civil Procedure 58. On January 8, 1992, the Tenth Circuit issued its decision reversing the judgment. On April 15, 1992, the Tenth Circuit entered an order granting, in part, and denying, in part, petitioners' petition for rehearing, rejecting their suggestion for rehearing en banc, reversing the judgment, and remanding the case for further proceedings. 954 F.2d at 608. Petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Petitioner Broderick Investment Company is the successor of Broderick Wood Products, Inc. (Broderick), which was formed in 1946. 954 F.2d at 603. Broderick's business involved pressure-treating wood products such as telephone poles and railroad ties with toxic chemicals, steam-cleaning the impregnated wood, and disposing of the residue chemicals, oils, and water. *Id.* For more than 35 years beginning in 1946, Broderick routinely discharged millions of gallons of untreated toxic waste onto its land by piping it into three pits dug into the ground (euphemistically referred to by Broderick as "containment ponds"). *Id.*; R. Vol. VIII at 1248-49, 1254, 1305-08, 1325, 1367-68. The parties disputed whether the sides of the main pit were partially lined with cement, but Broderick conceded that the other two pits were unlined

pits dug into the highly permeable, sandy soil below the level of the groundwater.[1] Exhs. 5, BC & BD; R. Vol. VIII at 1248-49 & 1254, 1305-08, 1325, 1367-68.

Broderick knew that its toxic waste was harmful to wildlife [R. Vol. II at 250, 253-54, 279; R. Vol. III at 406; R. Vol. V at 661; R. Vol. VI at 850-51, 915-17], that the soil was highly permeable, and that the groundwater was very close to the surface [R. Vol. II at 265-66, 272, 274-77; R. Vol. III at 300-01, 447; R. Vol. V at 735-37; R. Vol. VI at 841-43, 852-53, 857, 873, 904-07, 954; R. Vol. VIII at 1266-77, 1325]. Broderick let freshly treated wood products dry by allowing toxic wastes to discharge directly onto the land from rail cars on the "drip tracks." R. Vol. III at 438; R. Vol. VIII at 1265-66; Ex. BD. Broderick employees even spread the sludge dredged out of the main pit around the property to kill weeds. R. Vol. II at 250-52, 300-01; R. Vol. VI at 856 & 860-61; R. Vol. VI at 922.

Broderick stubbornly disregarded all evidence of its pollution until 1981—when the Environmental Protection Agency (EPA) first inspected the site. By mid-1983, the EPA conclusively determined that contaminates from Broderick's pits were flowing into the soil and groundwater. 954 F.2d at 603. As a result of the EPA's action, Broderick entered into a consent decree requiring investigation and, ultimately, remediation of the site. 954 F.2d at 603-04.

Having saved the overhead costs of disposing of its toxic wastes responsibly, Broderick demanded that its liability insurance carriers, including Hartford, pay for the

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[1] Broderick's characterization of the main pit as a cement-lined containment pond is a mischaracterization of fact. Broderick filed reports to the EPA describing *all* the pits on the property as *unlined* (Exs. E at 19, AG, BC & BD), and according to one employee, the main pit was not lined (R. Vol. VI at 845-46 & 859). In any event, the court of appeals adopted as true Broderick's characterization of the main pit as partially cement-lined.2 954 F.2d at 608.

resulting environmental damages. *Id.* at 604. A declaratory judgment action was filed in the district court to determine whether the Comprehensive General Liability (CGL) policies, including those issued by Hartford for years 1976 through 1984, provided Broderick with coverage for environmental response costs incurred by the EPA in cleaning up the facility. *Id.* at 606. Each CGL policy, however, contained a "pollution exclusion" clause plainly stating that the policy did not cover property damage "arising out of" the "discharge, dispersal, release, or escape" of "toxic chemicals . . . waste materials or other . . . pollutants into or upon the land" unless the discharge is both "sudden and accidental." *Id.* Since Broderick routinely and deliberately dumped toxic chemicals onto the land, Hartford argued that those discharges into and upon the land were neither sudden nor accidental. *Id.* at 606.

The district court, however, instructed the jury that the phrase "discharge, dispersal, release or escape" applied only to the entry of toxic chemicals into the groundwater, and did not apply to the initial discharge of toxic chemicals into the pits, so that unless Broderick expected or intended to contaminate the groundwater or the adjoining property, the pollution exclusion did not bar coverage. On the basis of these instructions, the jury returned a verdict for Broderick. *Id.* at 606.

The Tenth Circuit reversed, holding that the instructions were erroneous because "under any reasonable interpretation" of the policy, the phrase "discharge . . . into or upon the land" described Broderick's initial placement of toxic wastes into the pits. The court also ruled that the exception to the pollution exclusion did not apply because the *discharge* of pollutants by Broderick into and onto the land was neither "sudden" nor "accidental." While following Colorado law which interprets the word "sudden" favorably to insureds to mean "unintended or unexpected," the court of appeals nevertheless held that

Broderick's deliberate discharge of the chemicals into the earthen pits was not unintended or unexpected. "Therefore," the Tenth Circuit concluded, "the pollution exclusion clause applies and the property damage arising out of [Broderick's] discharge into the land is not covered under the unambiguous terms of the CGL policy." [2] *Id.* at 608.

REASONS FOR DENYING THE WRIT

"A petition for a writ of certiorari will be granted only when there are special and important reasons therefor." Sup. Ct. R. 10.1. Petitioners forget that this Court's primary function is to resolve questions of broad precedential value, not to correct error. Petitioners have utterly failed to identify any important reasons for this Court to review any issue presented here. This fact-bound case involving state law issues of contract interpretation does not present an issue of federal law, a conflict of law among the circuit courts, or any other reason supporting Supreme Court review, compelling or otherwise. The court of appeals merely carried out its duty to determine state law issues de novo, and it did so correctly. But even if it were wrong, petitioners' mere disagreement with the Tenth Circuit's opinion does not warrant Supreme Court review. The petition for a writ of certiorari should be denied.

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[2] On petitioners' petition for rehearing, the court of appeals reversed the judgment and remanded the case to determine whether the pollution exclusion precluded coverage for contamination caused by toxic waste that emanated from "plant equipment," and for other proceedings consistent with its opinion. 954 F.2d at 608-09. This modification of the judgment caused four issues raised by Hartford on appeal to become ripe for determination, but, over Hartford's objection, the court refused to rule on them.

I. THE TENTH CIRCUIT'S RULING DOES NOT WARRANT SUPREME COURT REVIEW BECAUSE IT INVOLVED A CONTROLLING QUESTION OF STATE LAW, AND ITS APPLICATION OF STATE LAW IN THE CIRCUMSTANCES OF THIS CASE WAS MANIFESTLY CORRECT

This Court has long instructed that "state law determinations by the Court of Appeals will rarely constitute an appropriate subject" for Supreme Court review. *Haring v. Prosise*, 462 U.S. 306, 314 n.8 (1983). Indeed, this Court pays "great deference" to the views of the lower federal courts on controlling issues of state law, and "is hesitant to overrule decisions by the federal courts skilled in the law of particular states unless their conclusions are shown to be unreasonable." *Bishop v. Wood*, 426 U.S. 341, 346 n.10 (1976). The sole dispute in this diversity jurisdiction case concerned the proper interpretation of the pollution exclusion under Colorado law. Petitioners have not identified any important question of federal law or any issue in conflict with the rulings of other courts that would support their request for certiorari. *See* Sup. Ct. Rule 10.

Petitioners assert (Pet. at 10) that this Court should grant certiorari and provide a uniform interpretation of the law of the various states on the pollution exclusion to prevent forum shopping. But that contention is meritless—it is not the role of this Court to create federal common law to bring uniformity to the laws of the various states. *Ruhlin v. New York Life Ins. Co.*, 304 U.S. 202, 206 (1938). Issues of contract interpretation, insurance or otherwise, are uniquely matters of individual states' laws.[3] The Tenth Circuit's ruling on this controlling issue of Colorado law is not appropriate for Supreme Court review.

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[3] Furthermore, choice of law principles preclude any real concern with forum shopping in any case, and that is especially true here: the insured was domiciled in Colorado, the dump site was located in Colorado, and the policy was issued in Colorado.

In any event, the court of appeals was correct in holding that the pollution exclusion precludes coverage for property damage arising from Broderick's intentional discharge of toxic wastes. Although the Court gets no hint of it from the petition, the undisputed evidence is that for 35 years Broderick engaged in the regular and nonsudden discharge of toxic waste into and onto the land at its wood treatment facility.[4] Contrary to petitioners' assertion (Pet. at 9-10), the overwhelming weight of authority from state to state and circuit to circuit, in trial and appellate courts alike, has interpreted the pollution exclusion precisely as did the Tenth Circuit here—to preclude coverage of property damage arising out of the regular and routine discharge of toxic wastes by the insured onto its land, even where toxic chemicals gradually and unexpectedly percolate through the ground and contaminate groundwater.[5] Obviously, as the courts recog-

[4] Petitioners' experts admitted at trial that when Broderick discharged its waste water it was putting chemicals "into or onto" the land and that the damage to the groundwater at the Broderick site resulted from these toxic discharges. This was also conceded to be a regular and deliberate business practice, not an accidental release. Transcript of October 2, 1989, hearing at 89-90; R. Vol. II at 142; R. Vol. III at 461-63; R. Vol. IV at 530-532, 535-36; R. Vol. V. at 788-89, 797-98 & 802-03. In fact, petitioners' counsel conceded at the hearing that if continuous discharge into the land could not be considered "sudden and accidental," then the pollution exclusion "knocked them out of the box." Transcript of November 4, 1988, hearing at 60.

[5] To dispel any doubt about where the overwhelming weight of authority lies on this issue, respondent refers the Court to the following cases in which the pollution exclusion was held to bar coverage where toxic wastes were deliberately discharged by the insured onto its land as a routine business practice, resulting in contamination to soil and ground or surface waters: *Great Lakes Container Corp. v. National Union Fire Ins. Co.*, 727 F.2d 30, 33 (1st Cir. 1984); *Fischer & Porter Co. v. Liberty Mut. Ins. Co.*, 656 F. Supp. 132, 140 (E.D. Pa. 1986); *Hayes v. Maryland Cas. Co.*, 688 F. Supp. 1513 (N.D. Fla. 1988); *USF&G v. Korman Corp.*, 693 F. Supp. 253 (E.D. Pa. 1988); *American States Ins. Co. v. Maryland Cas. Co.*, 587 F. Supp. 1549, 1553 (E.D. Mich. 1984);

nize, there is nothing "sudden and accidental" about toxic discharges occurring routinely, deliberately, and continuously over a period of many years and as a matter of regular business practice. *E.g., Hartford Acc. & Indem. Co. v. USF&G*, 962 F.2d 1484, 1489 (10th Cir. 1992), *citing USF&G v. Star Fire Coals, Inc.*, 856 F.2d 31 (6th Cir. 1988); *Ogden Corp. v. Travelers Indem. Co.*, 924 F.2d 39, 42 (2d Cir. 1991); *A. Johnson & Co. v. Aetna Casualty & Sur. Co.*, 933 F.2d 66, 73 (1st Cir. 1991).

Nor is there any issue in this case involving the meaning of "sudden." That issue of Colorado law was resolved in favor of insureds by the Colorado Supreme Court in *Hecla Mining Co. v. New Hampshire Ins. Co.*, 811 P.2d 1083 (Colo. 1991). The Tenth Circuit followed that ruling here.[6] Petitioners are hardly in a position to seek review in this Court of that favorable construction simply because courts construing the law of *other states* came to a different conclusion.

International Minerals & Chem. Corp. v. Liberty Mut. Ins. Co., 552 N.E.2d 758 (Ill. App. 1988); *Waste Mgt. of Carolinas, Inc. v. Peerless Ins. Co.*, 340 S.E.2d 374 (N.C. 1986); *Techalloy Co. v. Reliance Ins. Co.*, 487 A.2d 820 (Pa. Super. 1984). *Accord Lumbermens Mut. v. Belleville Indus.*, 938 F.2d 1423, 1429-31 (1st Cir. 1991); *State of New York v. Amro Realty Corp.*, 745 F. Supp. 832, 839 (N.D.N.Y. 1990), *aff'd on this issue*, 936 F.2d 1420, 1428-29 (2d Cir. 1991); *Ogden Corp. v. Travelers Indem. Co.*, 924 F.2d at 42; *USF&G v. Morrison Grain Co.*, 734 F. Supp. 437, 447-49 (D. Kan. 1990); *Outboard Marine Corp. v. Liberty Mut. Ins. Co.*, 570 N.E.2d 1154 (Ill. App. 1991).

[6] Petitioners' reliance (Pet. at 13) on *New Castle Co. v. Hartford Acc. & Indem. Co.*, 933 F.2d 1162 (3d Cir. 1991), is also misplaced. Although *New Castle*, like *Hecla*, interpreted the word "sudden" to mean "unexpected," it also held, again consistent with *Hecla*, that this construction did not alter the effect of the exclusion where the discharge of toxic chemicals into and onto the land was intentional. *New Castle* then remanded the case for a factual determination of whether the *discharge* of toxic chemicals by the insured, as opposed to the *damage* caused by the discharge, was unexpected and unintended. 933 F.2d at 1203. After remand, the court held that the discharge was *not* sudden and *not* covered. *New Castle Co. v. Hartford Acc. & Indem. Co.*, 1992 W.L. 174419, *6 (3d Cir. 1992). There is no conflict with the Tenth Circuit opinion in this case.

The petition for a writ of certiorari should be denied. Petitioners' invocation of the specter of forum shopping as a reason to justify creation of a federal common law of insurance contract interpretation is without merit.

II. THE COURT OF APPEALS ACTED WITHIN ITS POWER IN REVERSING THE JUDGMENT AND ORDERING THAT THE POLLUTION EXCLUSION BARS COVERAGE OF BRODERICK'S TOXIC WASTE DISCHARGES INTO THE PITS

Petitioners err in contending (Pet. at 17-18) that the court of appeals was without power to hold, as a matter of law, that the pollution exclusion bars coverage of Broderick's toxic waste discharges into the pits, simply because Hartford did not renew its motion for directed verdict at the close of all the evidence or move for judgment n.o.v.

Throughout this litigation, Hartford consistently argued that the pollution exclusion precluded coverage as a matter of law and asked the court of appeals to so order. Hartford's opening brief at 49; Hartford's reply brief at 25. That is precisely what the Tenth Circuit did, as to Broderick's discharges into the pits. In their principal brief, petitioners did not quarrel with this request for relief or raise any issue regarding Hartford's failure to move for directed verdict or judgment n.o.v. Thus, petitioners waived this argument, and cannot raise it here. *Neely v. Eby Construction Co.*, 386 U.S. 317, 330 (1967).

In any event, petitioners' contention does not withstand scrutiny. Under 28 U.S.C. § 2106, the Tenth Circuit had the power to reverse the judgment and order, as a matter of law, that the pollution exclusion barred coverage for Broderick's discharges into the pits. Section 2106 authorizes the court of appeals to:

> . . . affirm, modify, vacate, set aside or *reverse* any judgment, decree, or order of a court lawfully brought before it for review, and [to] remand the

> cause *and direct the entry of such appropriate judgment, decree, or order*, or require such further proceedings to be had as may be just under the circumstances. [Emphasis added.]

Given the undisputed fact that Broderick's discharge of waste into the pits was neither sudden nor accidental, the court of appeals' conclusion that the pollution exclusion barred coverage as a matter of law was both correct and appropriate.

Again, if petitioners were correct, this allegation of error has no significance outside the scope of this case, and for that reason alone, does not warrant Supreme Court review. Petitioners' argument again fails to recognize that this Court's role is not to correct error, but to resolve conflicts among the lower courts and to determine legal questions of great importance. *Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974). There simply is no basis for Supreme Court review here.

CONCLUSION

The petition for a writ of certiorari should be denied both because petitioners raise no important issue warranting review by this Court and because the Tenth Circuit's ruling is correct.

Respectfully submitted,

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